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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

JOHN A. LA SOTA, JR.,
The Attorney General

Rex E. Lee
2840 Iroquois Drive
Provo, Utah 84601
Special Assistant
Attorney General

Attorneys for Defendant
Appellants

JENNINGS, STROUSS & SALMON
Charles E. Jones
Jon L. Kyl
John B. Weldon, Jr.
111 W. Monroe, Suite 1800
Phoenix, Arizona 85003
Attorneys for Intervenor
Appellants

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Pursuant to Rule 12, the Appellants have requested the Clerk of the District Court to certify certain parts of the record in the belief that it may be helpful in reconciling the discrepancies between statements contained in the Jurisdictional Statement and the Motion to Affirm.

The Jurisdictional Statement declares:

> Of the five statutory provisions found constitutionally defective by the lower court (discussed below) the only one involved in any of the enforcement proceedings was § 1389, which deals with elections. Not one of these plaintiffs was involved in any way in any of those elections or any other election under the statute that they challenge. In none of the six election cases covered by the stipulation was there any allegation of unfairness because of delays. Jurisdictional Statement at 9.

The foregoing statement was drafted with care and with sensitivity to its impact on the justiciability issue. It is an absolutely correct statement, as the Court can verify by examination of the Enforcement Stipulation.

There is nothing in the Enforcement Stipulation indicating any enforcement or interpretation of Section 1385 C dealing with access to employer facilities. There is nothing in the Enforcement Stipulation indicating any interpretation of Section 1392 providing for criminal penalties. There is nothing in the Enforcement Stipulation indicating any interpretation or enforcement of Section 1393 B dealing with ten day injunctions. Examination of the Enforcement Stipulation also reveals that Section 1389 dealing with elections has never been applied to any plaintiff in this lawsuit, and the Enforcement Stipulation is devoid of any indication of any election problems resulting from delay.

With regard to the final section held unconstitutional by the lower court, a single unfair labor practice covered by Section 1385 B 8, the statement in footnote 19 of the Jurisdictional Statement is absolutely correct. That unfair labor practice provision has never been interpreted nor enforced. The statement in footnote 29 of the Motion to Affirm that "in at least 4 of the actions enforcing the Act against Appellees the parties bringing the actions relied upon this provision" is misleading and its misleading feature is flatly false. The reference to "this provision" is obviously intended to be a reference to subpart 8 of Section 1385 B. But the four actions to which the Appellees refer in their footnote 29 are actions under Section 1385 B. In only one case was a violation of subsection 8 even alleged (as discussed in our footnote 19) and in none was it either interpreted or enforced.

Therefore, the representations and implications to the contrary notwithstanding, the correct statement with reference to interpretation or enforcement of the provisions of the five statutory provisions held unconstitutional by the District Court is that not one of them has ever been interpreted or enforced in any proceedings involving any of these Plaintiffs. Of the five, only Section 1389 has ever been interpreted or enforced, as to anyone, and in none of the election proceedings covered by the Enforcement Stipulation was there ever an allegation of problems pertaining to delay.

With regard to the other six questions presented, the Motion to Affirm establishes clear disagreement with our position on the merits of these ques-

tions.[1] However, the arguments in the Motion to Affirm also clearly reveal that all of these issues are substantial. In the last analysis, the Appellees are left solely with the proposition that the District Court should be affirmed in all respects. Given the incontrovertible fact that the issues are substantial, we respectfully submit that they either be reviewed on the merits or be considered sufficient for summary reversal on grounds of justiciability.

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[1] The only new matter presented in the Motion to Affirm was the assertion that there is a legal presumption against severability of unconstitutional sections of the state statute. Motion to Affirm at 30. If there is any presumption under Arizona law it is to save a statute or as much of it as can be severed and saved. *State v. Snyder*, 25 Ariz. App. 406, 544 P.2d 230 (1976), (citing the decisions of this Court set forth in footnote 64 of our Jurisdictional Statement). Whether unconstitutional sections of a state statute are presumed severable or not, as this Court has noted, "the determination, in the end, is reached by applying the same test - namely, What was the intent of the lawmakers?" *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). As developed more fully in the Jurisdictional Statement at page 47, the intent here is disclosed by what the Legislature did in passing this statute. The legislative determinations concerning, for example, the need for an Agricultural Labor Board, the propriety of prohibiting a union from engaging in arson for the purpose of preventing the sale of agricultural products, and the prohibition against an employer making financial contributions to a union and discriminating in regard to hiring and tenure in order to discourage union membership are completely separate from policy decisions concerning election procedures, access to employer facilities, untruthful consumer publicity and arbitration of labor disputes.

The Agricultural Employment Relations Act represents a careful effort by the Legislature of the State of Arizona to deal with one of the most important problems facing that state. The issues are too important to permit the judgment of a single Court to be both the first and last word concerning the constitutionality of that effort.

Respectfully submitted,

JOHN A. LA SOTA, JR.,
The Attorney General

Rex E. Lee
2840 Iroquois Drive
Provo, Utah 84601
Special Assistant
Attorney General

William A. Gibney
General Counsel
Agricultural Employment
Relations Brd.
1688 West Adams, Room
221
Phoenix, Arizona 85007

Attorneys for Defendant
Appellants

JENNINGS, STROUSS &
SALMON
Charles E. Jones
Jon L. Kyl
John B. Weldon, Jr.
111 West Monroe, Suite
1800
Phoenix, Arizona 85003

Attorneys for Intervenor
Appellants